LIBRARY
COURT, U. S.

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-394

ROBERT MORGAN, *Petitioner*

*v.*

AUTOMOBILE MANUFACTURERS ASSOCIATION, Inc., et al., *Respondents*

## PETITION FOR REHEARING

Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DAVID BERGER
H. LADDIE MONTAGUE, Jr.
*Attorneys for Petitioner*

DAVID BERGER, P. A.
1622 Locust St.
Philadelphia, Pa. 19103

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-394

ROBERT MORGAN, *Petitioner*

*v.*

AUTOMOBILE MANUFACTURERS ASSOCIATION, Inc., et al., *Respondents*

## PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of November 19, 1973, denying the petition for writ of certiorari, and that upon rehearing a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-394

ROBERT MORGAN, *Petitioner*

*v.*

AUTOMOBILE MANUFACTURERS ASSOCIATION, Inc., et al., *Respondents*

## PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of November 19, 1973, denying the petition for writ of certiorari, and that upon rehearing a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

## REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Before the filing of the petition for writ of certiorari ("petition"), which was denied by the Court on November 19, Judge Manuel Real of the Central District of California had upheld various damage and injunctive claims, including petitioner's. On interlocutory appeal under 28 U.S.C. §1292(b), the Court of Appeals for the Ninth Circuit reversed the district judge's holding only as to the *damage* claims, ruling that petitioner (and all other plaintiffs) lacked standing under §4 of the Clayton Act, 15 U.S.C. §15. Although petitioner (alone among all plaintiffs)[1] was concededly injured in his "business or property", the court of appeals held that he was not within the "target area" of the alleged conspiracy.

The injunctive portion of these cases was remanded to the district court for further proceedings. On November 21, 1973, *two days* after the Court denied the petition, Judge Real entered a memorandum opinion and order denying all of the injunctive claims and dismissing the cases.[2] This new development, together with the decision of the court of appeals, evidences a considerable diminution of the scope and efficacy of the nation's antitrust laws—the very result which petitioner implored the Court to forestall by issuing the writ (Petition, Part V, pp. 22-27).

In his opinion, Judge Real recognized the substance of petitioner's claims:

---

1. All other plaintiffs were non-federal governmental entities—states, cities, and counties.

2. The opinion is reprinted in the Appendix, *infra*, pp. A1-A13. The only remaining claims are two comparatively minor actions filed by manufacturers of pollution control devices who allege that they have been foreclosed from competition in the sale and installation of such devices. *AMF, Inc. v. General Motors Corp.*, C.D. Cal., Civil Action No. 71-16R; *Sturtz v. General Motors Corp.*, C.D. Cal., Civil Action No. 69-1892R.

> "A cooperative program to attempt to find the root causes of automobile air pollution and to develop some control that would reduce or eliminate the automobile as a source of air pollution was inaugurated with the execution of a so-called "cross-licensing agreement" dating back to 1955. "Cooperation," as contemplated by the cross-licensing agreement, not only provided for the exchange of technical data but also prevented any defendant from releasing information relating to, or from announcing the use of, any developed control device without the concurrence of the other defendants.
>
> * * * All of these claims notwithstanding, the cooperative efforts of the defendants were less than spectacular; and often the cross-licensing agreement was used to advance the selfish aims of some of the individual defendants. Consequently, we must now consider whether these actions, taken both cooperatively and individually, are violative of the antitrust laws of the United States."

(Appendix, *infra*, pp. A7-A8).

The district judge went on to state, without explicitly deciding whether the conduct of the defendants violated the antitrust laws, that the equitable remedy sought was calculated to cure a nuisance and not an antitrust violation.

The scope of §4 of the Clayton Act, providing for private relief in antitrust cases, has been considerably constricted by the "direct injury" and "target area" tests adumbrated by various circuits in the eighteen years since the Ninth Circuit decided the *Karseal* case.[3] It was the dichotomy between these two tests, and the inadequacy of both tests, which petitioner invited the Court to resolve in the petition for certiorari. In light of the observations in

3. *Karseal Corp. v. Richfield Oil Corporation*, 221 F.2d 358 (9th Cir. 1955).

that petition, the practical consequences should the district court's latest decision be reaffirmed by the court of appeals would clearly impair the public interest.

The conspiracy that petitioner (and other plaintiffs) alleged in the *Multidistrict Vehicle Air Pollution* cases is perhaps the largest in United States economic history. In terms of its economic and environmental impact, the consequences of the conspiracy dwarf those of any prior antitrust case. These consequences include the noxious effects of environmental pollution which today ranks as one of the nation's foremost problems. The relationship between the pollution problem and the "energy crisis" is obvious. It is an interplay which is judicially cognizable and need not be chronicled here. Furthermore, petitioner's assertion that this economic conspiracy is unparalleled in its consequences cannot readily be disputed.

Petitioner has *never* suggested that all pernicious consequences of the automobile manufacturers' conspiracy are recoverable as damages under §4 of the Clayton Act. Indeed, petitioner concedes that §4 *limits* the potential liability under the nation's antitrust laws to those who can show a direct or primary nexus between the violation and injury to their "business or property." 15 U.S.C. §15. As the Court of Appeals found below, petitioner, as a farmer[4], was the only appellant-plaintiff who could successfully plead "injury" to "business or property" within the meaning of §4. Furthermore, it is possible that only a small percentage of the country's farmers have suffered damage to their crops as a direct consequence of environmental pollution caused by the conspiracy alleged below.

Nevertheless, in light of the recent dismissal of injunctive claims by the district court, the present posture of this case casts serious doubt upon the efficacy of this nation's antitrust laws as implemented by the courts.

---

4. Petitioner Morgan is a substantial crop-grower in Southern California, whose crop-yields have been diminished by some of the most severe environmental pollution in the United States.

Unless this Court at least hears this case, the largest horizontal conspiracy in United States economic history will go unredressed, and, what is worse, unheard by the Court in spite of its public importance and a crying need to resolve conflicts among the circuits on a pervasive rule of law. Those injured as a direct and primary consequence of the conspiracy have no recourse whatsoever. Indeed, the dismissal of the injunctive portions of the action ensures that the perpetrators of this conspiracy cannot even be directed to assist in ameliorating its noxious effects. Nor can those damaged as a primary result (which petitioner concedes is a limited class) be even partially compensated.[5]

Petitioner submits that this result undermines the proper administration of the antitrust laws. We think it appropriate and compelling that this monumental case, on its own merits, be reviewed by our nation's highest Court. Unquestionably, liability under §4 is limited. However, petitioner respectfully submits that this limitation should not extend so far as to excuse the nation's *largest* companies from virtually *all* consequences of this horizontal conspiracy. That result would not be consonant with either the letter or the spirit of the Clayton Act.

We beseech the Court to grant review so that a farmer who has been injured in his business and property by the horizontal conspiracy of the automobile manufacturers may at least be permitted to present the facts and legal contentions in support of his position. Only in this way will simple justice be done. Only in this way will due process of law truly be served.

---

5. As we noted in the petition (fn. 7, p. 25), the "competitor cases" (see fn. 2, *supra*) involve several strong defenses not relevant to petitioner's cause of action. Additionally, the potential damages in these cases are insignificant when compared to the scope, effect, and direction of the actual conspiracy.

## CONCLUSION

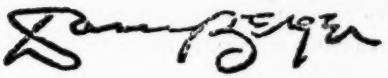
For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing of the petition be granted, and, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit. Alternatively, in light of the district court's dismissal of the injunctive claims, petitioner respectfully requests permission to renew this petition should the injunctive portions of this case ever reach the Court.

Respectfully submitted,

DAVID BERGER
H. LADDIE MONTAGUE, JR.
*Counsel for Petitioner*

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.



DAVID BERGER
*Counsel for Petitioner*